
CANADA / JUDGMENT

R. v. Schurman

2020 BCSC 961

COURT

Supreme Court of British Columbia

DECIDED

15 May 2020

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2020 BCSC 961 R. v. Schurman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Schurman,

2020 BCSC 961

Date: 20200515

Docket: 30125

Registry: Vancouver

Regina

v.

Jagger Ross Schurman

Before: The Honourable Mr. Justice Brundrett

(via teleconference)

On appeal from: Provincial Court of British Columbia

(R. v. Schurman, Vancouver File No. AJ18709785)

Oral Reasons for Judgment

Counsel for Crown/Respondent

appearing via teleconference:

K.H. Gagnon

The Accused/Appellant on his own behalf appearing via teleconference:

J. R. Schurman

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 15, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 15, 2020

- [1] THE COURT: Alright Mr. Schurman. I'm going to give you a decision on your case. It will just take about five or ten minutes. I'm going to rule in your favour. These are the reasons. They are prepared on an expedited basis, subject to editing if transcribed.

Introduction

- [2] This summary conviction appeal comes before me in the form of an application by the appellant, Mr. Schurman, to set aside his guilty plea.
- [3] The appellant was ticketed on December 7, 2019, for loud and unnecessary vehicle noise and two other mechanical infractions while he was driving his mother's car in Vancouver. He paid the indicated amounts on the ticket on December 30, 2019. This had the effect of being a deemed guilty plea under s. 14(11) of the Offence Act, R.S.B.C. 1996, c. 338.
- [4] On May 6, 2020, the appellant received an application to extend time in relation to Count 1 only of this violation ticket, which is the excessive noise count. Accordingly, that is the only matter before me.
- [5] The appellant has filed an affidavit, which I would accept into evidence. It meets the test for fresh evidence on appeal on the criteria set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. He attests that he was driving his mother's car, that he was under the impression that he would be principally fined but that the tickets would not go on his driving record. He also indicated that he was led into an erroneous understanding about the effect of pleading guilty with respect to the accumulation of points against his driver's licence by the attending officer's roadside statements. This point is strongly disputed by the Crown, which has filed its own affidavit which I would also admit into evidence on this appeal.
- [6] The issue then is whether the appellant should be permitted to withdraw his guilty plea on Count 1.

Principles Applicable to Setting Aside a Guilty Plea on Appeal

- [7] Section 686(1)(a) of the Criminal Code, R.S.C., 1985, c. C-46, which is incorporated into summary conviction proceedings, provides that the court may allow an appeal inter alia subparagraph (iii), on any ground where there is a miscarriage of justice.
- [8] The Court of Appeal construed the meaning of this phrase in the context of setting aside a guilty plea for the first time on appeal in *R. v. Alec*, 2016 BCCA 282:
- [75] An accused who is convicted following the entry of a guilty plea may appeal his or her conviction and assert that the plea was not valid and the underlying conviction the product of a miscarriage of justice. An appellate court will only permit the withdrawal of a guilty plea and quash a conviction where "valid grounds" for doing so have been shown: *Adgey* at 431.
- [76] There is no complete catalogue of the circumstances that may be found to constitute "valid grounds" for permitting an accused to withdraw a plea of guilty. The circumstances in which an appellate court will be justified in allowing an appeal from conviction where an accused has pleaded guilty are varied. The inquiry is case-specific and sufficiently flexible to take account of the almost infinite range of circumstances that might be said to have contributed to a miscarriage of justice: *R. v. Meers* (1991), 64 C.C.C. (3d) 221 (B.C.C.A.).
- [77] From the authorities referred to herein, it is clear that certain inquiries will feature prominently in cases of this kind. For example:
- Was the accused represented at the time of the plea?
 - Does the accused have a meritorious claim that he was incompetently represented during the trial or at the time of the plea, and has such a claim been advanced in connection with the appeal?
 - Was an inquiry of the sort contemplated by s. 606(1.1) of the Code undertaken at the time of the plea?
 - Was the plea entered by the accused personally?
 - Is there any evidence that the accused's plea was involuntary?
 - Does the record reflect equivocation about the plea? For example, did the accused seek to qualify the guilty plea in some way?
 - Does the record, or any additional evidence sought to be tendered on appeal, establish that the accused did not fully appreciate the nature of the charge in respect of which the plea was entered?
 - Does the record, or any additional evidence sought to be tendered on appeal, establish that the accused was uncertain about the consequences of the plea?

- Does the record, or any additional evidence sought to be tendered on appeal, establish that the accused did not intend to admit a fact which is an essential ingredient of the offence in respect of which the plea has been entered?
- Do the facts read into the record following the plea support a conviction?
- Has the accused tendered an affidavit on appeal explaining why the plea is invalid and why the underlying conviction should be set aside as a miscarriage of justice?
- How much time passed between the entry of the plea and the accused's first assertion that the plea is invalid? Has any explanation been given for delay in challenging the validity of the plea?

- [78] As noted in *R. v. Moore*, 2004 BCPC 560 at para. 22, "to permit accused persons to vacillate between claims of innocence, guilt and renewed claims of innocence would cause great mischief." There are strong policy reasons for dismissing an accused's application to withdraw a guilty plea when the appropriate time for making such a request has clearly passed and there has been no demonstration that the plea is invalid. When a guilty plea has been entered, the Crown stops devoting resources to the prosecution and the evidence may no longer be fresh. The inquiry must take account of prejudice to the public's interest in certainty, finality and the expeditious resolution of criminal matters: *R. v. Duong*, 2006 BCCA 325 at para. 10; *R. v. T.W.B.* (1998), 107 B.C.A.C. 39 at paras. 11, 13; *Eizenga* at paras. 70-71.
- [79] A miscarriage of justice will not be countenanced because of delay. But delay in advancing the assertion that a plea of guilty is invalid may be a measure of the strength of the claim, and a factor to be considered in determining whether to permit the withdrawal of the plea.
- [80] Where the validity of the guilty plea is raised for the first time on appeal, the appellant bears the onus of showing on a balance of probabilities that the plea was invalid. That onus is not easily discharged.
- [9] As noted by the court in *Alec*, the onus of showing a plea is invalid is on the applicant and that onus is not easily discharged.

Analysis

- [10] Here, the Crown points out that the assertion that the officer misled the appellant regarding the points in issue is a form of an officially induced error argument. It submits that the foreknowledge of the accrual of points may not be sufficient to constitute the lack of an informed waiver of rights under the Charter and the Offence Act. In this regard it cites *Miller v. British Columbia*, 2010 BCCA 39, for the proposition that unexpected collateral consequences in the form of purely administrative penalties are not to be sufficient to expunge a plea because those consequences do not impact the actus reus or mens rea of the offence. While the facts in *Miller* are similar, that case proceeded on a somewhat different footing in that it involved a petition where a constitutional exemption was granted in the context of the right to the presumption of innocence.

- [11] On the other hand, it has been held in some contexts that ignorance of the nature and consequences of the plea will factor into the assessment of whether a plea was informed: *R. v. Korman*, 2014 BCSC 1583 at paras. 17-18, 39; *R. v. Jack*, 2012 BCSC 1991 at para. 9; and *R. v. Wong*, 2018 SCC 25. In *Wong*, in the context of unintended immigration consequences, the Supreme Court recently held that for a plea to be informed, an accused must be aware of the criminal consequences of the plea, as well as the legally relevant collateral consequences which bear on sufficiently serious legal interests of the accused.
- [12] The Crown points out that the regularity offence in issue here is a strict liability one, meaning that mere inadvertence is unlikely to be a successful defence. Hence, the idea that the appellant unintentionally produced excessive noise is unlikely to carry the day in terms of a legally valid defence at trial. Overall it submits that there is no miscarriage of justice in allowing the appellant's guilty plea to stand.
- [13] Although the Crown's position is correct in principle, it appears to me that the appellant's position is somewhat broader than it has been characterized by the Crown.
- [14] In the appellant's submissions, he disputes that he was exceeding the appropriate noise limit and contends that his vehicle was not as loud as other vehicles he routinely encounters on the road in Vancouver. This is therefore not a case like *R. v. Yilmaz*, 2015 BCSC 904 where there was no underlying defence. In the appellant's affidavit he also indicates inter alia the following:
- he did not observe the officer to be using a decibel reader;
 - he believes his age and gender had a bearing on the decision to issue the violation for unnecessary noise;
 - he was driving his mother's car; and
 - he simply paid the ticket believing that violations for mechanical issues would not attract any demerit points.
- [15] From the tenor of the appellant's affidavit it appears that he is saying not only that he did not realize the effect of demerit points on his driving record, but he also may have had a legitimate defence that the car was not making excessive noise within the meaning of s. 7A.01 of the Motor Vehicle Act Regulations, B.C. Reg. 26/58:.

Division 7A -- Noise from Motor Vehicles

Prohibition

7A.01 No person shall start, drive, turn or stop any motor vehicle, or accelerate the vehicle engine while the vehicle is stationary, in a manner which causes any loud and unnecessary noise in or from the engine, exhaust system or the braking system, or from the contact of the tires with the roadway.

[Emphasis added.]

[16] The term "loud and unnecessary noise" is not defined in the Regulations.

[17] Here, the precise cause of the illicit noise from the appellant's vehicle is not entirely clear to me. It appears uncontested that the appellant was new to driving a vehicle with a standard transmission and that he may have been driving slowly as he suggests. To the extent that there was a noise caused by the changing of gears, there may well be a legitimate defence as to whether such noise was loud and unnecessary within the meaning of s. 7A.01.

[18] As to whether the appellant was led into error by the attending officer, Constable Cain's affidavit indicates he issued the violation ticket, and did not have a specific recollection of his conversation with the appellant. However, Constable Cain attested he was well aware that the charge of excessive noise carried penalty points, and he has never told someone that points would not be assessed against them where the opposite is true.

[19] Thus, there is a contradiction in the evidence between the appellant's recollection of being told that he would not receive points for Count 1 and Constable Cain's understanding and practice. I cannot resolve the contradiction, but I do accept that it may well be that the appellant came away from his conversation with Constable Cain about the lights on his mother's vehicle with a mistaken understanding as to the consequences of a finding of guilt for excessive noise.

[20] I also note that the appellant did not appear to have the benefit of legal advice prior to paying his ticket. At 18 years old, he was relatively young and had just received his licence in April of 2019. This appears to have been his first experience with the violation ticket system. The accumulation of demerit points will have a significant impact on his driver's licence, which I am told has been suspended. I accept the appellant's evidence that he would not have opted to plead guilty had he been fully informed of the consequences.

[21] Therefore, having regard to all of the circumstances and looking at the context in a somewhat wider vein than the Crown has urged upon me, I find that the appellant has met the burden of showing that his effective guilty plea was not properly informed and to let it stand would amount to a miscarriage of justice.

Conclusion

[22] The appeal on Count 1 is therefore allowed. The conviction is set aside and a new trial on Count 1 is ordered.

[23] So Mr. Schurman, you'll have your day in court. You're not acquitted. You're merely being sent back for a new trial on Count 1. I would expect the traffic court registry will advise you of a new hearing date in the Provincial Court.

"Brundrett J."

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Prepared on 25 October 2026 · Esheria